No. 10-885

Supreme Court, U.S.
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In The

Supreme Court of the United States

ALEXIS WITT, ON BEHALF OF THE ESTATE OF DEAN WITT, DECEASED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* VETERANS' EQUAL RIGHTS PROTECTION ADVOCACY IN SUPPORT OF PETITION FOR CERTIORARI

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I. Interest of *Amicus Curiae* VERPA in This Lawsuit[1]

On December 4, 1950 this Court handed down its decision in *Feres v. United States*, 340 U.S. 135 (1950), in which it denied relief under the Federal Tort Claims Act, 28 U.S.C. § 1346 *et seq.* ("FTCA"), to the family of a serviceman who had died as the result of a fire in a military barracks. On the same date, the Court decided two companion cases involving claims of medical malpractice committed against soldiers who were on active duty, and held that the suits could not be maintained because of sovereign immunity (*Jefferson v. United States* and *United States v. Griggs* [*ibid.*]). The common thread running through the three decisions was that in each instance, the injuries alleged "arise out of or are in the course of activity incident to service" in the armed forces. This non-textual, judicially created exception to the waiver of immunity in the FTCA has come to be called "the *Feres* doctrine."

Amicus curiae Veterans' Equal Rights Protection Advocacy, Inc. ("VERPA") was formed on December 10, 1999 under Minnesota law, with a primary goal to

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

remedy the injustices to servicemen that have accumulated under the *Feres* doctrine since it was first announced in 1950. VERPA's membership is made up exclusively of servicemen and their families who have been barred by the holding in *Feres* from seeking redress in the federal courts for injuries received in the course of military service. Its board is very active in sponsoring and moving cases through the courts whose circumstances are such as to prompt a reconsideration of the misguided rationales said to justify the doctrine. VERPA attempts to ensure that military members, discharged Veterans and their families are provided "equal justice under law" and that they may freely exercise their right to petition the government for redress of grievances under the First Amendment of the United States Constitution, given their unfair and unequal treatment to date by the courts and Congress.

II. Introduction and Summary of Argument

A man comes down with appendicitis. An ambulance transfers him to the closest hospital, which is maintained by a branch of the United States government. After his swollen appendix is successfully removed, he is lying on a gurney, still under the effects of anesthesia, and waiting to be moved into a post-operative care room.

A surgical nurse removes his airway. It is too soon – under the anesthesia, his throat muscles collapse, and he begins gasping for breath. Inexplicably, the

nurse has walked away, and no one notices the patient's distress until it is too late. They wheel him into a nearby pediatric unit, but the equipment with which they try to revive him is too small for the job. An emergency intubation miscarries, and sends the essential oxygen he needs into his esophagus, rather than into his lungs. After lapsing into a coma for a day, the patient dies.

The family of the decedent sues the United States Government for wrongful death under the Federal Tort Claims Act. What result?

(A) If the man is the spouse of a member of the armed forces on active duty, his widow's suit is not barred under the Federal Tort Claims Act (*Costley v. United States*, 181 F.2d 723 [5th Cir. 1950]).

(B) If the man is a veteran, retired from active duty, his suit is not barred under the Federal Tort Claims Act (*United States v. Brown*, 348 U.S. 110 [1954]).

(C) If the man is a civilian in federal custody, his suit is not barred under the Federal Tort Claims Act (*United States v. Muniz*, 374 U.S. 150 [1963]).

(D) But if the man is a member of the armed forces, whether or not he is on leave or active duty at the time of the malpractice, his family's suit is barred because his death "ar[o]se out of or [was] in the course of activity incident to service" (*Feres v. United States*, 340 U.S. 135 [1950]; *United States v. Johnson*, 481 U.S. 681, 692 [1987]).

The case of suffering medical malpractice while on leave from active duty is the subject of the current petition for certiorari: *Witt v. United States*, 379 Fed.Appx. 559 (9th Cir. 2010); *see also Persons v. United States*, 925 F.2d 292, 296 (9th Cir. 1991); *Veillette v. United States*, 615 F.2d 505, 507 (9th Cir. 1980).

The foregoing illustrations point up the irrationality of the *Feres* doctrine. Under it, prisoners in federal custody are afforded greater remedies for malpractice by government hospitals and their staff than are the members of the armed forces of the United States. Of especial interest to *amicus* VERPA, the doctrine discriminates in favor of veterans against soldiers currently serving their country.

Under the case law that has developed since *Feres*, the discrimination no longer makes sense. Exactly the same medical staff, and the same military hospital, may be sued in federal courts if the victim is a military dependent, or a veteran – even though in each of their cases, the medical services in question may also be said to have arisen "out of . . . activity incident to [a member's] service." (The treatment in a military hospital would not have occurred but for the prior or concurrent service by a member of the armed forces.) Therefore, whatever basis may still be said to underlie the *Feres* doctrine, it cannot be that any such suit against military medical staff and hospitals "would be disruptive of discipline and the orderly conduct of military affairs." (*Henninger v. United*

States, 473 F.2d 814, 816 [9th Cir.], *cert. denied*, 414 U.S. 819 [1973]).

Such a rationale, however, is the only one to which the lower federal courts still pay lip service. This Court itself has systematically undermined or abandoned each of the other rationales it previously offered to support the *Feres* doctrine, and the remaining rationale holds up no better under analysis. (*See United States v. Johnson*, *supra*, 481 U.S. at 694-700 [Scalia, J., dissenting]; *Costo v. United States*, 248 F.3d 863, 874-76 [9th Cir. 2001] [Ferguson, J., dissenting], *cert. denied*, 534 U.S. 1078 [2002].) Under these circumstances, further adherence to the *Feres* doctrine on *stare decisis* grounds is indefensible, and its application in particular to cases of medical malpractice is, given the statutory immunity of military doctors, discriminatory and irrational.

III. Reasons for Granting the Writ

A. After Sixty Years, *Feres* No Longer Serves any Rational Purpose

If any vestiges of reasons for the *Feres* rule survive after sixty years, it cannot be because of the rule itself. The phrase "activity incident to service", having been pulled and stretched and applied to all kinds of fact situations, is now empty of content. (One court describes the phrase as having given way to an "'incidental to service' inquiry . . . ". *See Costo v. United States*, *supra*, 248 F.3d at 870 n. 1.) Six

decades of confusing and conflicting case law attest to its ambiguities.

The phrase is so open-ended that it has been held to comprise driving home from the grocery store in a civilian vehicle on a public highway which crosses Eglin Air Force Base in Florida while off-duty, so as to deny recovery (*Flowers v. United States*, 764 F.2d 759 [11th Cir. 1985]), but it does not include riding a motorcycle back from a personal errand on a public highway which crosses Fort Stewart in Georgia while off-duty (*Pierce v. United States*, 813 F.2d 349 [11th Cir. 1987]; *see also Hand v. United States*, 260 F.Supp. 866 [M.D.Ga. 1966]).

And even though this Court has warned against the drawing of bright lines (*United States v. Shearer*, 473 U.S. 52, at 57 [1985]), and to judge each case on its own facts, such distinctions have nonetheless emerged out of the absence of any discernible guideposts for the doctrine's application. Lower courts, for example, frequently find the factor of whether the injury was sustained while "on-base" to be dispositive. In this way, the *Feres* doctrine was held to bar recovery to the estate of an off-duty serviceman killed while sleeping in a base's family quarters when a military aircraft crashed into the building (*Orken v. United States*, 239 F.2d 850 [6th Cir. 1956]). It did not bar recovery, however, for a similar accident causing severe injury to an off-duty serviceman sleeping in a trailer home located just off-base. (*Sapp v. United States*, 153 F.Supp. 496 [W.D.La. 1957]; *see also*

Snyder v. United States, 350 U.S. 906 [1955], *aff'g* 118 F.Supp. 585).

These results, typical of the quagmire brought about in the name of *Feres*, cannot be rationalized by any purported divination of Congressional intent behind the FTCA. The key language "incident to service" was lifted by the *Feres* court out of the old Military Personnel Claims Act, former 31 U.S.C. § 223(b) (1943), which Congress *repealed* in passing the FTCA.[2] Normally this Court would take the language replaced by a subsequent enactment of Congress as an indication of that which Congress intended to *change* – otherwise the repeal is given no effect. *See, e.g., Thompson v. Thompson*, 218 U.S. 611, 616-17 (1910). The rule of *Feres* thus rests on a statutory

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[2] Former 31 U.S.C. § 223(b) (1943; repealed 1946) provided:

> The Secretary of War, and, . other officer or officers as he may designate . . . are hereby authorized to consider, ascertain, adjust, determine, settle and pay in an amount not in excess of $500, or in time of war not in excess of $1,000, . . . any claim against the United States . . for damage to or loss or destruction of property, real or personal, or for personal injury or death,
>
> provided, the provisions of this Act shall not be applicable to claims arising in foreign countries . or the claims for damage to or loss or destruction of property of military personnel . if such damage, loss, destruction, injury, or death, occurs incident to their service.

The new Administrative Claims Act, 28 U.S.C. § 2672, authorizes settlement of military and other claims up to $25,000 *without regard to* whether they arise "incident to service."

construction erected in spite of the FTCA, and not because of it. For that reason alone, the rule of *Feres* is an incorrect construction of the FTCA and deserves to be overruled.

Taking into account the totality of circumstances, *amicus curiae* submits that the maxim that should apply to this case is *cessante ratione legis, cessat et ipsa lex*. The judicial creation of a legal fiction is intended to carry out a policy purpose; that policy purpose is supposed to derive from an ascertainable intent of the legislature. No one can point to the intent of Congress in enacting the FTCA and divine that malpractice claims of spouses and dependents were included within the scope of the Act, while identical malpractice claims of soldiers were not. When the line that has previously been attempted in a case of this type ("injuries received in military hospitals while serving in the military are received incident to service") begins to produce results obviously arbitrary and irreconcilable with legislative intent, it is an indication that blind adherence to a legal fiction, or *stare decisis*, has replaced the original reason for the rule. And if that were sufficient reason for retaining it, then no case would ever be overruled.

Nor can this Court hand off the task of repairing the damage done by the *Feres* doctrine to Congress. As shown above, the phrase "activity incident to service" is now so vague as to be empty of content. Congress could do no better than the lower courts have done, over the past sixty years, in trying to give it meaningful substance. Moreover, having deliberately

chosen to repeal that language in enacting the FTCA, it is not Congress' task to repeal it yet again.

Feres, as restated and affirmed in *Johnson*, has lasted long enough. No conceivable rationale exists for its continuing to wreak random and arbitrary havoc among the families of those who are in the service of their country. *Amicus curiae* VERPA respectfully requests the Court to grant the petition in this case, and to call on the parties to brief for it fully the issues involved in any overruling of *Feres* and *Johnson*.

B. The *Feres* Doctrine Should Be Inapplicable to All Cases of Medical Malpractice

If *Feres* and *Johnson* are not to be overruled, this case should at a minimum serve as the vehicle by which to mark their limit. While it is true that two of the companion cases decided along with *Feres* involved military medical malpractice, the time has come to re-examine the basis for declaring that injuries to servicemen in military hospitals are received "incident to service".

Concerns about military doctors being brought into court to testify in malpractice cases are ephemeral, given that they must do so already in cases brought by dependents and veterans. Indeed, the reality is that with the nonliability afforded the government by *Feres*, the only incentive to improve standards of military medical care has come from the

litigation allowed to military dependents and to veterans. As a result, the armed forces now have a claims process for malpractice in place, which operates efficiently enough; reported court decisions involving military dependents' claims of malpractice are few and far between.[3] In fact, given the relative frequency with which the lines of *Feres* are tested in malpractice suits brought by servicemen and their representatives, compared to the relative paucity of reported malpractice suits brought by dependents and veterans, there is obviously a basis on which to assert that the administrative claims process presently in existence will *lessen* the current burden on the courts in the great majority of such cases, where questions of military decisions and discipline are not involved.

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[3] A 1971 case reasoned that if the legal fiction regarding the presumed effect of malpractice suits upon discipline were abandoned, the armed services would be faced with maintaining a claims department, a decision that should be left to Congress. *Hall v. United States*, 451 F.2d 353, 354 (1st Cir. 1971). The court unaccountably overlooked the fact that an efficient military claims department had already been processing dependents' malpractice claims since before *Feres*. The same department, of course, must pass on all claims of servicemen and their representatives before they are brought to the courts (28 U.S.C. § 2401[b]). Thus the number of claims to be processed would increase only by the number of servicemen presently deterred from litigating even liability under the existing bright-line rules; the remainder consist of existing claims that will have to be examined for damages in addition to liability. Surely that would not be too unequal a trade-off for the current burden on the Department of Justice in litigating over "incident to service".

The *Feres* decision was handed down in 1950. Since that time, military doctors and their staff have been granted statutory immunity from personal liability for malpractice (Pub. L. 94-464, § 1[a], effective Oct. 8, 1976 [10 U.S.C. § 1089]), and courts have uniformly affirmed that military *dependents* may sue the government for injuries due to malpractice in military hospitals. Given these changes, it can no longer be contended that medical malpractice suits by servicemen have the potential for an adverse impact upon essential military discipline.

A number of cases have reasoned that because military personnel receive free medical care in military hospitals only because of their military status, the injuries received due to malpractice were "incident to service." *See, e.g., Johnson v. United States*, 704 F.2d 1431, 1438-39 (9th Cir. 1983), and cases cited. The reasoning has not escaped criticism, *e.g., Adams v. United States*, 728 F.2d 736, 740 (5th Cir. 1984). With all due respect, it is submitted that this reasoning cannot stand up to logical examination, and should be discarded.

The illogic appears when one considers the cases just cited that permit recovery to military dependents injured by malpractice, on the theory that such injuries do *not* occur "incident to service." (This is a perfect illustration of the empty content of the phrase "incident to service," as noted *supra*, at 6-7.) Military dependents, like military personnel themselves, are usually accorded treatment in military hospitals only because of their status. *Compare* 10 U.S.C. § 1076

(2001) *with Veillette v. United States*, 615 F.2d 505, 507 (9th Cir. 1980). Like military personnel, they too could not be injured "but for" the fact that they are privileged to receive free medical care in military hospitals. Yet this fact bars neither their recovery *nor* recovery by the serviceman whose relation to them gives them the right to free medical benefits. Therefore, the receipt of free medical benefits, standing alone, is not determinative of whether injuries received from such care are received "incident to service." *See also Adams*, 728 F.2d at 738-41.

The same result can be reached by analogy to *United States v. Muniz*, 374 U.S. 150 (1963). In that case, using a "plain meaning" interpretation of the FTCA, the Court permitted a prisoner in government custody to sue the government for injuries received during confinement. The Court in *Muniz* had granted certiorari because of conflicting lower court decisions regarding prisoners which had relied on *Feres*. Proceeding with precisely the same inquiry into Congressional intent that it conducted in *Feres*, the Court now concluded that Congress had authorized the prisoner's claim. The anomaly here is that, in contrast to *Feres*, the Court rejected an argument that such suits could disrupt discipline. Moreover, like military personnel, federal prisoners receive free medical care. Nevertheless the Court made no effort to distinguish *Feres*. Thus was born the egregious state of FTCA law pursuant to which criminals in confinement are accorded greater rights than free military personnel in the service of their country.

Such inconsistency is another tell-tale sign that a legal fiction has outlived its purpose, as argued earlier.

Cases involving malpractice committed upon pregnant women are another instance of the lack of any meaningful distinction between the treatment afforded to those in the armed services and their spouses and dependents. A soldier's pregnant spouse may recover under the FTCA for medical malpractice, despite *Feres* (*Costley*, *supra*), while a pregnant woman *soldier* injured by malpractice is barred (*Atkinson v. United States*, 825 F.2d 202 [9th Cir. 1987], *cert. denied*, 485 U.S. 987 [1988]).

The two women could have received the same negligent treatment in all respects. The same witnesses would be called, the same factual inquiries made, the same claims of negligent conduct leveled against a military physician by a fellow member of the military (the woman's husband would be claiming that the negligence resulted in loss of consortium and loss of his wife's services). Neither the suit by the civilian wife nor her military husband would be barred. Yet the civilian spouse and the soldier spouse are indistinguishable in that they are both entitled to free medical care for their pregnancy in the military's hospital.

It makes no sense to try to distinguish the cases on the basis of the victims' status; the negligence toward each of them was exactly the same in character and degree. But in *both* cases the only reason it is

possible to be negligent toward the victims at all is because of the *soldier's* military status. Given this unalterable fact, it exalts semantics over substance to claim that "decisions by the military toward enlisted personnel" are involved in the negligence toward a soldier, but not in the negligence toward a soldier's wife.[4] Would a military doctor view the standard of care and treatment as any different for the two patients, both of them pregnant women? Does not the injuring of a soldier's dependent wife, husband, or child have just as much an effect on military morale and discipline, and on the soldier's attitude toward his or her superiors, as does an injury to the soldier?

The metaphysical content of "incident to service" causes the greatest difficulty in cases of malpractice injuries to unborn children. The lower courts vary all over the map in such cases, from holding that such injuries are "incident to [the mother's] service" (*Scales v. United States*, *supra*, 685 F.2d at 973), to holding that they clearly are not (*Mossow v. United States*, 987 F.2d 1365, 1370 [8th Cir. 1993]), to holding that such a suit is not barred if the actual injury was to the fetus, and not derivative from injuries to the mother (*Brown v. United States*, 462 F.3d 609, 612-16 [6th Cir. 2006]).

There *is* an anomaly here – one that simply cannot be reasoned away. It is an anomaly that is due

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[4] *Cf. Scales v. United States*, 685 F.2d 970, 974 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983).

to the continued application of a legal fiction that has outlived its usefulness in dealing with the situations encountered in today's armed forces. The fiction that medical malpractice injuries are received "incident to service" was invented by later courts to explain the *Feres* rule as applied in *Griggs* and in *Jefferson*, its two companion cases. Now that the core concern of *Feres* is recognized as the potential which a given case may have on judicial involvement in purely military affairs, and given the intervening legislative changes made by Congress, the need for maintaining such a fiction in medical malpractice cases has vanished.

Amicus curiae VERPA urges the court to grant the petition in *Witt*, and to limit the *Feres* doctrine to cases other than those involving medical malpractice in military hospitals.[5]

IV. Conclusion

Over one hundred and ten years ago, this Court read a judicially created exception into another text which had been carefully deliberated in Congress – the Fourteenth Amendment. The *Feres* exception has now outlasted the one in *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896), and thereby gained an unenviable

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[5] Existing statutory exceptions to 28 U.S.C. § 2680 already preclude suits for injuries received while in military field hospitals, which are erected to serve combatants, or in facilities outside the United States (subsections [j], [k]).

record. Its ultimate fate should be no less discernible, following the accumulation of more than sixty years of confusion and deprecation in the lower courts. The present case provides the Court with an occasion to rectify, or at least to begin the process of mitigating, the arbitrarily harsh results of its *Feres* rule. *Amicus curiae* Veterans' Equal Rights Protection Association respectfully requests the Court to grant certiorari in the present case for the purpose of either limiting or overruling *Feres* and *Johnson*.

Respectfully submitted,

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